

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re)
) Case No. S079656
)
 MIGUEL ANGEL BACIGALUPO,)
)
)
 On Habeas Corpus.) *Death Penalty*
)
 _____)

TRAVERSE TO RETURN TO ORDER TO SHOW CAUSE

Santa Clara County Superior Court No. 93351
 Honorable Thomas Hastings, Judge

SUPREME COURT
 FILED

MAY 28 2002

Frederick K. Ohlrich
 Frederick K. Ohlrich Clerk
 DEPUTY

ROBERT R. BRYAN, Calif. Bar No. 079450
 2088 Union Street
 San Francisco, California 94123-4124
 Telephone: (415) 292-2400
 Facsimile: (415) 292-4878

KEVIN G. LITTLE, Calif. Bar No. 149818
 2115 Kern Street, Suite 330
 Fresno, California 93721-2100
 Telephone: (559) 486-5730
 Facsimile: (559) 486-4759

Attorneys for Petitioner,
 MIGUEL ANGEL BACIGALUPO

DEATH PENALTY

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Telephone: (415) 292-2400
Facsimile: (415) 292-4878

KEVIN G. LITTLE, Calif. Bar No. 149818
2115 Kern Street, Suite 330
Fresno, California 93721-2100
Telephone: (559) 486-5730
Facsimile: (559) 486-4759

Attorneys for Petitioner,
MIGUEL ANGEL BACIGALUPO

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EXHIBIT 85, Declaration of Luis Alberto Albarran-Arnal, Feb. 26, 1999

EXHIBIT 89, Declaration of Confidential Informant, May 25, 2002
(filed separately under seal)

ROBERT R. BRYAN, Calif. Bar No. 079450
2088 Union Street
San Francisco, California 94123-4124
Telephone: (415) 292-2400
Facsimile: (415) 292-4878

KEVIN G. LITTLE, Calif. Bar No. 149818
2115 Kern Street, Suite 330
Fresno, California 93721-2100
Telephone: (559) 486-5730
Facsimile: (559) 486-4759

Attorneys for Petitioner,
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TO: HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES

COMES PETITIONER by and through his counsel, by way of a traverse and denial to Respondent's Return to Order To Show Cause, and Memorandum of Points and Authorities, filed September 6, 2001, admits and denies the allegations contained therein as follows:

I.
General Denial

Petitioner denies each and every allegation and argument set forth in Respondent's Answer and the Memorandum of Points and Authorities, in-

cluding each allegation indirectly averred through various incorporations by reference, except that which is hereafter expressly admitted.

II. Incorporation by Reference

All claims and allegations in the 330-page Petition for Writ of Habeas Corpus and Volumes 1-6 of Exhibits In Support of Petition for Writ of Habeas Corpus, including Exhibits A-X, Appendices 1-88, filed June 11, 1999, are incorporated by reference and re-alleged herein as though set forth in full. Petitioner also incorporates by reference into this Traverse as if set forth in full, all relevant factual allegations and arguments contained in the Appellant's Opening Brief, Appellant's Reply Brief, and all supplemental briefing on the automatic appeal previously pending this Court in *People v. Bacigalupo*, Nos. S032738 and S035368.

Petitioner incorporates by reference the recently signed declaration of the confidential informant, in which she affirms under oath that the declarations she signed on August 7, 1997, Exhibits 86 and 87, are in all aspects true and correct. (Exhibit 89, May 25, 2002, filed under seal May 2002.) Her sworn statements establish the prosecutorial misconduct and concealment of exculpatory evidence raised in Claims G and I of the Petition for Writ of habeas Corpus.

Also incorporated by reference is the declaration of Luis Alberto Albarran-Arnal, which is attached hereto. (Exhibit 85, Declaration of Luis Alberto Albarran-Arnal, Feb. 26, 1999.) It establishes that the killings in issue were ordered by Jose Angarita, and supports the duress defense.

The references to titles and descriptions of habeas corpus claims hereinafter are not intended to limit, and do not limit, the scope of said claims as specifically stated in the Petition for Writ of Habeas Corpus and reincorporated herein.

III. Custody and Death Judgment

Petitioner admits that he is in the custody of Respondent at San Quentin State Prison pursuant to a judgment of death imposed in the Santa Clara Superior Court, Case No. 93351. On April 9, 1987, following a 2 1/2-day guilt trial, Appellant was found guilty on two charges of first degree murder with the determination that the robbery-murder and multiple-murder special circumstances were true. (CT 338, 357.) Petitioner was sentenced to death on or about June 12, 1987, rather than the date incorrectly provided by Respondent. (CT 534, 538.)

On September 12, 1988, Petitioner filed a *pro per* habeas corpus petition that was denied on September 22, 1988. (*In re Bacigalupo*, No. S007168.) It is admitted that the convictions and death sentence was affirmed on appeal. (*People v. Bacigalupo* (1991) 1 Cal. 4th 103.) However, Petitioner specifically denies that said judgment is lawful as claimed in the Answer.

Further, it is admitted that on December 9, 1992, the United States Supreme Court granted the Petition for Writ of Certiorari filed on behalf of Petitioner, vacated the judgment, and remanded the case to this Court in light of *Stringer v. Black* (1992) 503 U.S. 222, to evaluate the constitutional validity of the sentencing factors used in the California death penalty scheme. (*Bacigalupo v. California* (1992) 506 U.S. 802 .) It is also admitted that this Court thereafter found the sentencing factors constitutional under *Stringer* and reaffirmed the earlier judgment. (*People v. Bacigalupo* (1993) 6 Cal.4th 457.)

Petitioner denies: (1) guilt as to first or second degree murder; (2) the truth of the special circumstances; and (3) the factual and legal validity of the underlying jury findings for all alleged offenses.

IV.

It is admitted that on a request for stay and counsel was filed in the United States District Court on August 3, 1994. (*Bacigalupo v. Calderon*, U.S. Dist. No. C-94-2761-DLJ (N.D. Cal.)) A stay of execution was issued the same day. It is also admitted that nearly a year later on July 28, 1995, counsel were appointed on behalf of Petitioner. Further, it is admitted that a Petition for Writ of Habeas Corpus was subsequently filed, but the correct date was October 29, 1997 rather than that cited by Respondent.

V.

It is admitted that the pending Petition for Writ of Habeas Corpus was filed with this Court on June 11, 1999, asserting, *inter alia*, that the prosecution failed to disclose the names of a confidential informant and other witnesses and their statements which supported a duress defense at the guilt phase and/or helped to prove the mitigating factor of duress at the penalty phase, and the prosecutor and/or her agents also knowingly presented false and misleading testimony/argument. (Petition for Writ of Habeas Corpus, Claim G at pp. 143-149.) Further, it is admitted that under Claim G a confidential informant told an investigator with the district attorney's office that she learned from Jose Angarita, a Columbian drug dealer, that the killing of Orestes and Jose Guerrero were "drug hits" contracted by Jose Angarita. The confidential informant was then instructed by the district attorney investigator or prosecutor not to disclose this information to the trial court at the *in camera* hearing held to determine whether the identity of the informant should be disclosed. As a consequence of the illegal and fraudulent concealment of crucial evidence, the court denied the defense request for the identity of the informant and incorrectly determined that the prosecution possessed no exculpatory information.

Petitioner also admits that Claim I, paragraph 6 asserts that the prosecution obtained material exculpatory evidence from Ronnie Nance, Steve Price and Luis Alberto-Arnal, but concealed it from the defense. (Petition for Writ of Habeas Corpus, Claim I at pp. 152-154.) The prosecution had information supporting Petitioner's duress defense that a Columbian drug dealer had ordered the Guerrero brothers killed or Petitioner's family would be executed. (Exhibit 86, *supra*; Exhibit 85, Declaration of Luis Alberto Albarran-Arnal, *supra*, attached hereto.) The prosecutor's office interviewed Nance and Price and assisted in the prosecution of Albarran-Arnal, and obtained material exculpatory information from these witnesses. However, it did not turn over this exculpatory information to the defense to the prejudice of Petitioner.

The confidential informant recently verified and adopted under oath her 1997 declaration in its entirety. (Exhibit 89, May 25, 2002.) Her declaration is submitted herewith under seal, with a copy having been provided to Respondent.

It is correct that on April 27, 2000 this Court requested that Respondent provide an informal response to the Petition for Writ of Habeas Corpus pursuant to Rule 60, California Rules of Court. On March 14, 2001 the Court issued an order to show cause for Claim G and Claim I, paragraph 6, raised in the habeas corpus petition. Those claims are incorporated herein by reference, provide:

G. Prosecutorial Misconduct: Failure To Disclose The Names of a Confidential Informant and Other Witnesses and Their Statements Which Supported a Duress Defense at The Guilt Phase or Helped to Prove The Mitigating Factor of Duress at The Penalty Phase; Presentation of False and Misleading Testimony/Argument

1. Petitioner's conviction and sentence of death were obtained in violation of his rights to due process, fair trial, unbiased jury, effective assistance of trial and appellate

counsel, to present a defense, to confront and cross-examine, to a reliable determination of guilt and penalty, and to meaningful appellate review as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15 and 16 of the California Constitution, because the prosecution failed to disclose the names of a confidential informant and other witnesses and their statements which supported a duress defense at the guilt phase and/or helped to prove the mitigating factor of duress at the penalty phase, and the prosecutor and/or her agents also knowingly presented false and misleading testimony/argument. The facts supporting this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to, the following:

2. Petitioner hereby incorporates by reference as if set forth fully herein Claims A, B, C, D, E, F, H, I and K, Arguments I and II from Appellant's Opening Brief on direct appeal in this case before this Court, Claims IX, X, XI, XII, XIII, XIV, XV from *In re Bacigalupo*, No. S032738, Declaration of Russell Kuebel, the Declaration of Dr. Renato Alarcon and all supporting exhibits, the declarations of Jane Doe I and II and Luis Alberto Albarran-Arnal and the juror declarations of Norma Delaplaine, Irene Hevener, Carol Larter, Carole Lusebrink, Sandra Petro and Alison Staab. This claim has already been presented to this Court in *In re Bacigalupo*, No. S032738, Claims IX, X, and XI. Petitioner is presenting this claim again to this Court in order to add additional factual support and exhibits which were the product of recent investigative funding authorized by the United States District Court.

3. A confidential informant and other witnesses told the government that the homicides in this case were most likely "drug hits" ordered by a Columbian drug dealer, Jose Angarita and his associates, and that Angarita was most likely motivated by revenge based on an incident that had happened connected to his illegal drug trafficking business. The confidential informant obtained this information from Jose Angarita, who the government suspected was involved with illegal drug trafficking. On the basis of this information, the government interviewed the informant on April 18, 1984, and

tape recorded the interview. The government talked to several other witnesses who had information concerning the drug dealer's orders to kill the Guerrero brothers, as well.

4. The informant was a close associate of Angarita's and she had detailed information about Angarita's extensive cocaine trafficking operation in San Jose. The informant remembered Angarita picking up petitioner around December 1983 in San Francisco and introducing petitioner as someone from New York who was going to work for him. Soon after the capital offences occurred, the informant suspected that Angarita had ordered the murders. Angarita started acting very nervous. The Guerrero brothers had worked at Angarita's store and Angarita complained about them being a burden. She also remembered that Angarita sometimes suggested that problems be resolved in a violent way, such as having people killed. The informant told all of this information to the prosecutor's investigator, and agreed to cooperate with the authorities. She also knew that other witnesses, such as Ronnie Nance and Steve Price had given similar information to the prosecutor's office. She assisted in the prosecution of Angarita's associates, including Albarran-Arnal, in the cocaine business and testified *in camera* in a federal court drug conspiracy case. The government financially compensated her for her efforts. She also testified *in camera* as a confidential informant in petitioner's case. However, the prosecutor presented false and misleading testimony because the informant was told by the prosecutor and/or her agent that she should not mention to the court "the possibility that the Guerrero brothers' murders were contract hits ordered by Jose [Angarita]." Decl. Of Jane Doe I. Had the informant's identity been disclosed to petitioner's defense counsel, the informant would have provided him with this information.

5. The information provided by the confidential informant and other witnesses corroborated petitioner's statement to the police that he committed the homicides under duress. Shortly after his arrest, petitioner told police that he had committed the crimes on the order of members of the "Columbian Mafia," who had threatened to kill him and his family before January 1, 1984, if he did not kill the Guerrero brothers. RT 3230, 3232, 3234-3235. Petitioner was told that

the Guerrero brothers “were already sealed,” and that they were on “the list.” RT 3232.

6. Petitioner told police he had worked for “the Colombians” as a teenager. He stated that when his brother Luis, Jr. refused to cooperate with them in New York, he was murdered. Luis Jr.’s murderers escaped, undetected by the police. The New York police never apprehended or charged anyone with Luis Jr.’s murder.

7. Petitioner’s trial counsel moved for disclosure of the name and whereabouts of the confidential informant. CT 240-245. An *in camera* hearing was held on August 29, 1985; the motion was denied. CT 249-251. The hearing was reported, transcribed, and ordered sealed. CT 251.¹

8. Petitioner’s statements were presented to the jury, but defense counsel provided no corroboration for this theory of the crime. The prosecutor committed misconduct by presenting a false and misleading argument to the jury that petitioner’s statements -- that he was acting under duress-- were lies. RT 3075; 3485-89. The prosecutor also presented the testimony of Karlos Tijiboy, who denied any involvement with Angarita’s drug operation or the capital offenses. This was misconduct as well, because the prosecutor knew that this testimony was false and misleading.

9. The trial court erred in refusing to allow defense counsel to present evidence that the Guerrero brothers were involved in criminal activity, which also would have corroborated petitioner’s statements. RT 3312-15. The prosecution failed to disclose all information concerning the Guerrero brothers criminal activities and association with Angarita.

1. On May 13, 1988, petitioner moved the trial court for an order unsealing the record of the August 29, 1985 hearing concerning the confidential informant. On August 30, 1988, petitioner moved the California Supreme Court for an order unsealing that part of the record. Both courts denied the requests.

10. Duress was a defense to the charges of robbery, first degree murder, and the special circumstance finding. It was also a statutory factor in mitigation of sentence.

11. Petitioner was prejudiced by the prosecution's failure to disclose the identity and testimony of the informant and statements of the other witnesses. The prosecutor and/or her agents also knowingly presented false and misleading testimony of the informant. Had petitioner been able to present evidence corroborating that he acted under duress, as he told the police, it is reasonably likely that a more favorable outcome would have resulted. See juror declarations of Norma Delaplaine, Irene Hevener, Carol Larter, Carole Lusebrink, Sandra Petro and Alison Staab.

12. The decision of the California Supreme Court on this issue additionally deprived petitioner of the effective assistance of counsel, due process of law, and meaningful appellate review. This Court reviewed *in camera* the transcripts withheld from petitioner's counsel, and concluded there was no error. The Court's decision was made without benefit of informed briefing or argument from counsel, because counsel was denied access to the information upon which the court based its decision.

13. The conduct of the government in this case was deliberate and egregious and part of a pattern of prosecutorial misconduct and thus warrants the granting of this petition without any determination whether it substantially influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Furthermore, the government's conduct so infected the integrity of the proceeding against petitioner that the error cannot be deemed harmless. In any event, this violation of petitioner's rights had a substantial and injurious effect or influence on the verdict, rendered the trial and the guilt and penalty judgments fundamentally unfair and resulted in a miscarriage of justice.

(Petition for Writ of Habeas Corpus, at pp. 143-149.)

I. The Prosecution Improperly Withheld Exculpatory Information

1. Petitioner's conviction and sentence of death were obtained in violation of his rights to due process, fair trial, unbiased jury, effective assistance of trial and appellate counsel, to present a defense, to confront and cross-examine, to a reliable determination of guilt and penalty, and to meaningful appellate review as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15 and 16 of the California Constitution, because the prosecution and its agents improperly withheld potentially exculpatory information from the defense.

2. Petitioner's conviction and sentence of death were obtained in violation of his rights to due process, fair trial, unbiased jury, effective assistance of trial and appellate counsel, to present a defense, to confront and cross-examine, to a reliable determination of guilt and penalty, and to meaningful appellate review as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15 and 16 of the California Constitution, because the prosecution and its agents improperly withheld potentially exculpatory information from the defense. The facts supporting this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include, but are not limited to, the following:

3. Petitioner hereby incorporates by reference as if set forth fully herein Claims A, B, C, D, E, F, G, H and K, Arguments I and II from Appellant's Opening Brief on direct appeal in this case before this Court, Claims IX, X, XI, XII, XIII, XIV, XV from *In re Bacigalupo*, No. S032738, Declaration of Russell Kuebel, the Declaration of Dr. Renato Alarcon and all supporting exhibits, the declarations of Jane Doe I and II and Luis Alberto Albarran-Arnal and the juror declarations of Norma Delaplaine, Irene Hevener, Carol Larter, Carole Lusebrink, Sandra Petro and Alison Staab. This claim has already been presented to this Court in *In re Bacigalupo*, No. S032738, Claims IX, X, and XI. Petitioner is presenting this claim again to this Court in order to add additional factual

support and exhibits which were the product of recent investigative funding authorized by the United States District Court.

3. At trial, petitioner's defense to the charges was that he committed the robbery and homicides under duress.

4. Other than petitioner's own statements to police, the defense of duress was not corroborated at either the guilt phase or the penalty phase.

5. Information furnished to the state by the confidential informant, and other witnesses, and never disclosed to petitioner, supported his defense of duress. The prosecutor and/or her agents also knowingly presented false and misleading argument and testimony of the confidential informant. The jury was never advised of this information.

6. Potential witnesses Ronnie Nance, Steve Price and Luis Alberto Albarran-Arnal all had information supporting petitioner's duress defense that a Columbian drug dealer had ordered the Guerrero brothers killed or petitioner's family would be executed. Decls. Of Jane Doe and Luis Alberto Albarran-Arnal. The prosecutor's office interviewed Nance and Price and assisted in the prosecution of Albarran-Arnal, and obtained material exculpatory information from these witnesses. The prosecutor failed to turn over this information to the defense. Additionally, the prosecutor requested that defense counsel "hold off" from investigating Angarita and the duress defense until after they conducted their initial investigation. The prosecutor then established the confidential informant and refused to disclose any of the material exculpatory information to petitioner's counsel.

(*Id.*, at pp. 152-154.)

VI.

It is admitted that the supporting evidence regarding the two issues specified in the Order to Show Cause included a declaration from the confidential informant. (Exhibit 86, Aug. 7, 1997; Exhibit 89, May 25, 2002.)

On May 25, 2002, the informant reaffirmed and adopted under oath her 1997 declaration, which provided in relevant part:

12. As part of my cooperation with the government, I testified in camera as a confidential informant in the Santa Clara County capital murder trial and the federal cocaine case. In *United States v. Luis Angel Laureano, et al*, USDC # CR84-2079 RPA, I testified in camera before Judge Robert Aguilar. I told the federal court what I knew about Jose Angarita and Luis Laureano. Laureano and his co-defendants were convicted. I also testified in camera before Judge Thomas Hastings in *People v. Miguel Bacigalupo*. My testimony was very brief and I was not asked many questions in that case. I remember that *Sandy Williams told me not to mention the possibility that the Guerrero brothers' murders were contract hits ordered by Jose*. The defense counsel were not present during my in camera testimony in both cases. After the federal case, the DEA offered to place me in the federal witness protection program. I declined, because I felt that there was no real threat and I did not want to change my identity.

13. *Had my identity been disclosed to the lawyers for Miguel Bacigalupo, I would have told them all that I have described above.*

(Exhibit 86, Aug. 7, 1997; Exhibit 89, May 25, 2002 (emphasis added).)

Supporting evidence as to the issues specified in the Order to Show Cause also includes a declaration from Mr. Albarran-Arnal. It verifies that the homicides were ordered by Jose Angarita. As explained by the witness:

1. I knew Miguel Angel Bacigalupo Padilla briefly in 1983 when he moved to California. At the time, I worked as a car salesman at the East Side Auto Sales in San Jose, California. . . .

2. I came to the United States in the 1970's. . . . After moving to California, I met Jose Angarita, who ran several small jewelry store businesses in the area. Angarita was also the head of an extensive cocaine trafficking operation in the San Jose, California area.

3. Jose Angarita had come to the United States from Colombia, where his family ran a large drug trafficking operation. The operation he set up in San Jose, which was an extension of the one in Colombia, became very expansive and at one point I believe he was trafficking enormous amounts of drugs and making millions of dollars as a result.

4. I eventually became involved with Jose Angarita and worked for him transporting cocaine. Angarita had many employees who participated in various parts of the operation. I was a very low level participant and did not benefit much from the proceeds. Because I was new to this country, I did not know enough to expect greater reimbursement for the dangerous work I was doing. At the time, I was also not fully informed as to the seriousness of the repercussions of the work I did for Angarita. I later realized its seriousness when I was arrested in July of 1984 and eventually convicted and sentenced to 6 years in federal prison for the sale and possession of cocaine. I served my sentence and was released in July 1988 and subsequently deported.

5. Most of the work I did for Angarita involved transporting cocaine and money. I remember one time he asked me to drive a trailer carrying a boat from California to Miami, Florida for around \$3000. He did not tell me what was in the boat, which was typical because he was a very secretive person. When I arrived in Miami, I turned the boat over to his contacts there and I heard them telling each other that cocaine was stuffed inside the walls of the boat. They thought that I could not speak English so they were not careful about what they said in front of me. When they returned the trailer to me to drive back to California, they had put money in the tires of the trailer.

6. I remember being introduced to Miguel Bacigalupo Padilla by Angarita. Jose told me that Miguel had just arrived in California and that he would be working with him. I remember thinking that Miguel seemed extremely young and naive and did not seem to have the slightest idea as to what he was getting into. He was also very quiet and polite.

....

7. In the Fall of 1983, I had a conversation with Angarita concerning the Guerrero brothers, that I remembered later due to their murders. I remember speaking to Angarita on one occasion in which he told me angrily that the two brothers, Orestes and Jose Guerrero, had stolen about 2 kilos of cocaine from him. I remembered the Guerreros because I had accompanied Angarita when he went over to their jewelry store many times. The Guerreros hid some of Angarita's cocaine and money in their store. Angarita told me he was looking for a gun, making it clear that he planned on having the Guerrero brothers killed. Angarita said he would not ignore slights such as these. His drug business depended on people knowing that they could not steal from him and get away with it. I pitied the Guerrero brothers because apparently they did not know who they had attempted to double cross.

8. I came to fear Jose Angarita because through my experiences with him, it became clear to me that he was a ruthless and somewhat unstable man. While I knew him, he consumed cocaine heavily and it appeared that he was dependant on it. He ran his drug business with an iron grip and did not allow anyone to cross or cheat him. Anyone who threatened him was either eliminated or dealt with in extreme ways. During the time I was there, I knew that he had ordered assassinations of people who had cheated or slighted him. In fact there were "sicarios" or paid assassins that were called in occasionally to do away with certain people. I remember Angarita calling in a *sicario* during the time I worked for him to kill a local trafficker.

9. In addition to my observations, I also experienced Angarita's violent tendencies first hand. On one particular occasion, Jose almost shot me and three other men who worked for him. I remember once he came into the room we were sitting in and pointed a rifle at us and prepared to shoot us. It was obvious that he was very high on cocaine and he really did not know what he was doing. Luckily, I was able to knock the rifle out of his hand and disarm him. He was surprised at my quick reactions and later came to his senses. I firmly believe that if I had not been able to stop him at the time, he would have killed me and his three other em-

ployees.

10. Jose Angarita also threatened to kill me and my family. In July of 1984, I was arrested for attempting to sell 10 kilos of cocaine to an undercover DEA agent. Gail Kesselman, Angarita's former girlfriend, had apparently been questioned by the police for her suspected involvement in Angarita's drug business, and was told that if she helped them arrest Jose Angarita, she would be let go. Gail had done a great deal of work for Angarita, transporting and selling his drugs to New York, Texas and throughout California. She had been very close to him and knew most of his business dealings, but, at that time, she and Angarita were no longer romantically involved, so she contacted me and told me she had a large drug sale. I agreed to help her. As it turned out, the sale was a set up by the DEA. After my associates and I were arrested by DEA agents, I was told by the authorities that if I was willing to give them sufficient information to arrest Jose Angarita, they would offer me a deal. The DEA told me that they had been trying to obtain information to arrest Angarita for a long time because they knew that he had been running large amounts of drugs into the San Jose area. However, I immediately began receiving threats from Angarita's associates and employees. They threatened to kill me and my wife. When she came to visit me in jail, she told me that two of Angarita's men were watching her house at all hours of the day. She also started receiving threats. I was terrified because I had seen such threats carried out and I knew that Angarita would have killed us if I provided any information to the officials about him.

11. Out of fear for my wife and me being killed, I refused to cooperate with the authorities and elected to serve my prison sentence rather than take the chance that they would not be able to protect us.

12. Angarita fled the country shortly after the Guerrero Brothers were killed. The last time I saw him was at a party I had at my house in the beginning of January 1984. He told me that he had to leave the country because he believed the police were after him for the Guerrero murders. In addition, he said he was facing charges at the time for molesting a minor. I also believe that there was a drug trafficker in Mi-

ami who had ordered his assassination. I believe Angarita returned to Bogota, Colombia and continued working in the drug cartel from there.

13. I was never contacted by any member of Miguel Bacigalupo's legal team. After I was sent to prison in 1985, and I knew Angarita had left the country for good, I would have provided the information in this statement to his defense attorney. Since I was in federal prison in another state, I did not know that Miguel was facing the death penalty for the murder of the Guerreros. Given my experiences with Angarita, and the angry statements he made about wanting to kill the Guerrero brothers for cheating him out of two kilos of cocaine, I believe that Angarita went forward and ordered the killings of the Guerrero brothers. Also, due to my experiences, I believe that Angarita threatened Miguel and his family to insure Miguel's cooperation in killing the Guerrero brothers. Miguel would have been well-justified in taking Angarita's death threats extremely seriously and relying on the fact that if he did not comply, the threats would be carried out. Further, it was well known that Angarita was able to successfully elude the authorities and avoid arrest for his drug operation so it would not have been wise to rely on law enforcement to stop him. Just as I was not willing to rely on the authorities for protection from Angarita, Miguel was wise to believe that any protection promised by the authorities was not going to keep Angarita from carrying out his death threats. His network was extensive and very well organized. I am thankful that I never found myself in that position. Serving time in prison and being deported in order to avoid Angarita's wrath was horrible enough.

(Exhibit 85, *supra*, Declaration of Luis Alberto Albarran-Arnal.)

VII.

Petitioner disputes and denies paragraph VII of the Return, and demands strict proof with the right to present evidence and cross-examine. In fact, the informant stated under oath that the prosecution investigator, Sandy Williams, specifically told her "not to mention" to the trial judge that the "murders were contract hits ordered by Jose." (Exhibit 86, *supra*, at ¶

12.) Further, the informant was aware that the homicides were the result of a murder contract ordered by Jose Angarita.

It is not true that “the defense investigator . . . must have added the challenged information.” The information in the confidential informant’s 1997 declaration is exactly as stated by her to Petitioner’s legal representative. At the time it was carefully reviewed by the witness in detail, acknowledged and affirmed, and signed under oath. (Exhibit 86, *supra*.) Three days ago she again reviewed the declaration, and again verified under oath its accuracy. That included signing and dating paragraph 12. (Exhibit 89, *supra*.)

VIII.

Petitioner denies the contents of paragraph VIII of the Return, and demands strict proof with the right to cross-examine and present evidence.

IX.

Petitioner denies the contents of paragraph IX of the Return, and demands strict proof with the right to cross-examine and present evidence.

X.

Petitioner denies the contents of paragraph X of the Return, and demands strict proof with the right to cross-examine and present evidence.

XI.

Petitioner denies the substance of paragraph XI of the Return, and demands strict proof with the right to cross-examine and present evidence.

XII.

Petitioner denies the contents of paragraph XII of the Return, and demands strict proof with the right to cross-examine and present evidence.

XIII.

It is admitted that Claim I, paragraph 6, asserts that potential witnesses Ronnie Nance, Steve Price, and Luis Alberto Albarran-Arnal possessed exculpatory evidence supporting Petitioner's duress defense. The prosecution interviewed Nance and Price, and assisted in the prosecution of Albarran-Arnal and thus obtained material exculpatory information. However, the exculpatory evidence was withheld from the defense. Additionally, the prosecutor requested that defense counsel "hold off" from investigating Angarita and the duress defense until after they conducted their initial investigation. The prosecutor then established the confidential informant and refused to disclose exculpatory material to Petitioner's counsel. (Petition for Writ of Habeas Corpus, Claim I, ¶ 6, at p. 154.)

XIV.

Petitioner denies the substance of paragraph XIV of the Return, and demands strict proof with the right to cross-examine and present evidence.

XV.

Petitioner denies the substance of paragraph XV of the Return, and demands strict proof with the right to cross-examine and present evidence.

XVI.

Petitioner denies the substance of paragraph XVI of the Return, and demands strict proof with the right to cross-examine and present evidence.

XVII.

Petitioner denies the substance of paragraph XVII of the Return, and demands strict proof with the right to cross-examine and present evidence.

XVIII.

Contrary to Respondent's assertions, Claims G and I in the pending Petition for Writ of Habeas Corpus state a factual and legal basis for habeas corpus relief.

IXX.

Constitutional Deprivations

Petitioner's conviction and sentence of death were obtained in violation of his rights to due process of law, a fair trial, an unbiased jury, effective assistance of trial and appellate counsel, to present a defense, to confront and cross-examine, to a reliable determination of guilt and penalty, and to meaningful appellate review, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, sections 1, 7, 15 and 16 of the California Constitution, because the prosecution and its agents, as specified in Claims G and I, (1) failed to disclose the names of a confidential informant and other witnesses and their statements which supported a duress defense at the guilt phase and/or helped to prove the mitigating factor of duress at the penalty phase, (2) knowingly presented false and misleading testimony and argument, and, (3) improperly withheld exculpatory information from the defense.

XX.

Merits of the Habeas Corpus Claims

Contrary to Respondent's assertions, Claims G and I in the Petition for Writ of Habeas Corpus state a factual and legal basis for habeas corpus relief. The factual and constitutional merits of the contentions are self-evident from a review of the claims and supporting exhibits.

XXI.

If it is found, *arguendo*, that Claims G and I when standing alone fail to state facts upon which relief can be granted, this Court should neverthe-

less determine that the claims do state facts on which relief can be granted when examined in conjunction with other claims in the Petition for Writ of habeas Corpus and in particular that the prejudice resulting from each claim is legally sufficient under all the facts and circumstances of the case, taking into account such facts as would exist if other errors and improprieties alleged had not occurred. Petitioner reincorporates herein by reference each and every claim in the Petition, and incorporates in each such claim all facts alleged in support of all other claims therein.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays judgment as follows:

A. Determine that Respondent's Answer to the Petition for Writ of Habeas Corpus, and supporting Memorandum of Points and Authorities, are fatally flawed and must be denied;

B. Order and conduct an evidentiary hearing at which proof may be offered concerning the allegations of the Petition;

C. Issue a writ of habeas corpus to have Petitioner brought before it to the end that he might be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional death sentence;

D. Permit Petitioner, who is indigent, to proceed without prepayment of costs and fees;

E. Grant Petitioner full civil discovery rights including the authority to obtain subpoenas *in forma pauperis* for witnesses and documents necessary to prove the facts alleged in the Petition;

F. Continue the stay of Petitioner's execution pending final disposition of this Petition and all related proceedings;

G. After full consideration of the issues raised in the Petition, vacate the judgments of conviction in the Santa Clara County Superior Court, Case No. 93351;

H. Issue an order granting Petitioner a new trial; and,

I. Grant Petitioner such further relief as is appropriate and in the interest of justice.

Dated: May 28, 2002

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert R. Bryan", written over a horizontal line.

ROBERT R. BRYAN
Attorney for Petitioner

DECLARATION OF SERVICE BY MAIL

I declare that I am over 18 years of age, not a party to the within cause; my business address is 2088 Union Street, San Francisco, California 94123. Today I served a copy of the attached

TRAVERSE TO RETURN TO ORDER TO SHOW CAUSE

on the following, by mailing same in an envelope, postage prepaid, addressed as follows:

Jeffrey M. Laurence, Esq.
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102-3664

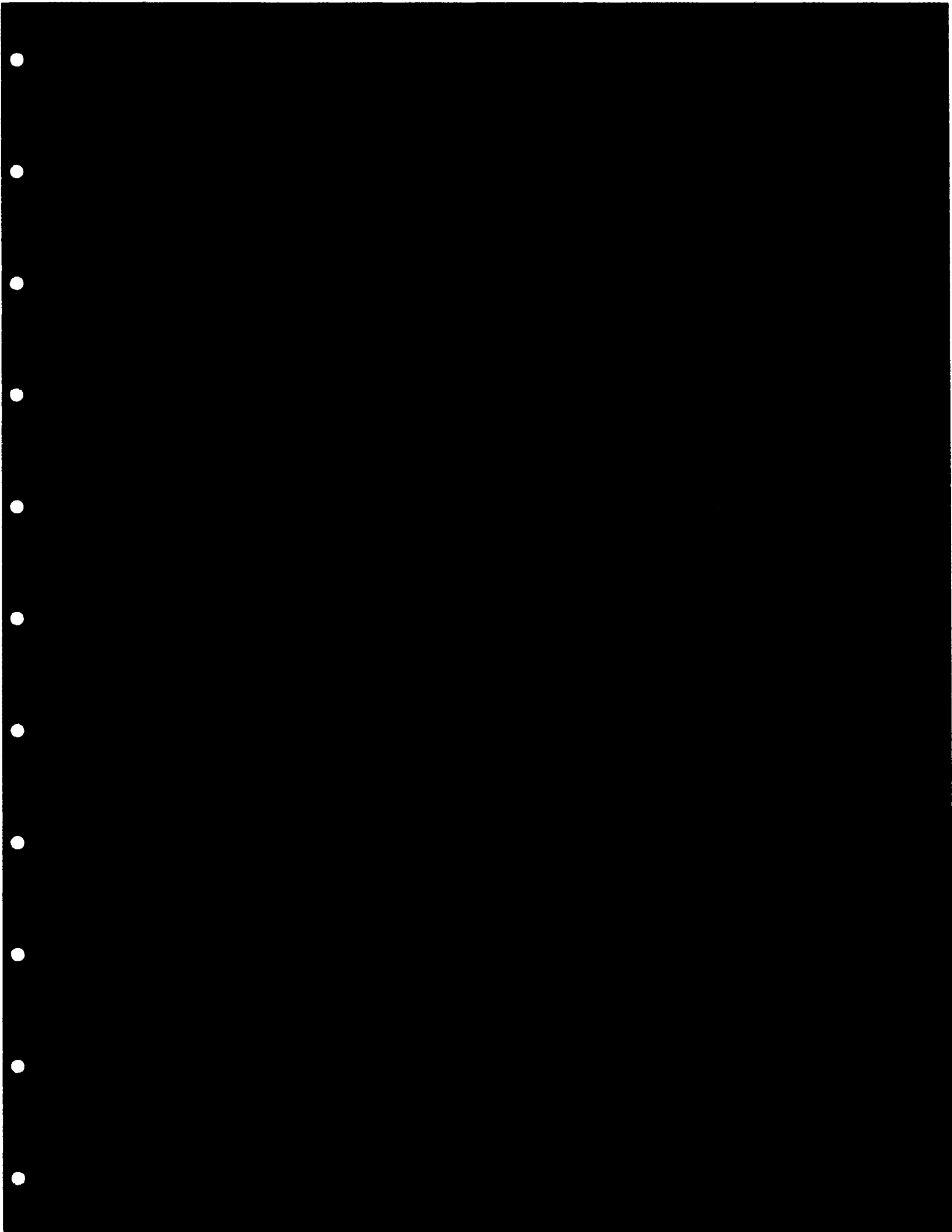
Miguel Angel Bacigalupo, Appellant
P.O. Box D-59100
San Quentin State Prison
San Quentin, California 94974

Steven W. Parnes, Esq.
California Appellate Project
One Ecker Place, Suite 400
San Francisco, California 94105

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 28th day of May, 2002, at San Francisco, California.





DECLARATION OF LUIS ALBERTO ALBARRAN-ARNAL

I, Luis Alberto Albarran-Arnal, declare the following:

1. I knew Miguel Angel Bacigalupo Padilla briefly in 1983 when he moved to California. At the time, I worked as a car salesman at the East Side Auto Sales in San Jose, California. I was known as Luis Angel Laureano. My date of birth is September 7, 1951 and I am from Caracas, Venezuela.

2. I came to the United States in the 1970's. I initially lived in Massachusetts with my family and eventually moved to California in the early 1980's. After moving to California, I met Jose Angarita, who ran several small jewelry store businesses in the area. Angarita was also the head of an extensive cocaine trafficking operation in the San Jose, California area.

3. Jose Angarita had come to the United States from Colombia, where his family ran a large drug trafficking operation. The operation he set up in San Jose, which was an extension of the one in Colombia, became very expansive and at one point I believe he was trafficking enormous amounts of drugs and making millions of dollars as a result.

4. I eventually became involved with Jose Angarita and worked for him transporting cocaine. Angarita had many employees who participated in various parts of the operation. I was a very low level participant and did not benefit much from the proceeds. Because I was new to this country, I did not know enough to expect greater reimbursement for the dangerous work I was doing. At the time, I was also not fully

informed as to the seriousness of the repercussions of the work I did for Angarita. I later realized its seriousness when I was arrested in July of 1984 and eventually convicted and sentenced to ^{15 L.A.} 6 years in federal prison for the sale and possession of cocaine. I served ~~my~~ ^{L.A.} 6 year sentence and was released in July 1988 and subsequently deported.

5. Most of the work I did for Angarita involved transporting cocaine and money. I remember one time he asked me to drive a trailer carrying a boat from California to Miami, Florida for around \$3000. He did not tell me what was in the boat, which was typical because he was a very secretive person. When I arrived in Miami, I turned the boat over to his contacts there and I heard them telling each other that cocaine was stuffed inside the walls of the boat. They thought that I could not speak English so they were not careful about what they said in front of me. When they returned the trailer to me to drive back to California, they had put money in the tires of the trailer.

6. I remember being introduced to Miguel Bacigalupo Padilla by Angarita. Jose told me that Miguel had just arrived in California and that he would be working with him. I remember thinking that Miguel seemed extremely young and naive and did not seem to have the slightest idea as to what he was getting into. He was also very quiet and polite.

7. I also met ^{C.L.A.} Karlos Tijiboy through my work for Angarita. Several times I delivered cocaine to his house from Angarita. I believe ^{C.L.A.} Karlos also transported and sold drugs for Angarita.

8. In the Fall of 1983, I had a conversation with Angarita concerning the Guerrero

brothers, that I remembered later due to their murders. I remember speaking to Angarita on one occasion in which he told me angrily that the two brothers, Orestes and Jose Guerrero, had stolen about 2 kilos of cocaine from him. I remembered the Guerreros because I had accompanied Angarita when he went over to their jewelry store many times. The Guerreros hid some of Angarita's cocaine and money in their store. Angarita told me he was looking for a gun, making it clear that he planned on having the Guerrero brothers killed. Angarita said he would not ignore slights such as these. His drug business depended on people knowing that they could not steal from him and get away with it. I pitied the Guerrero brothers because apparently they did not know who they had attempted to double cross.

9. I came to fear Jose Angarita because through my experiences with him, it became clear to me that he was a ruthless and somewhat unstable man. While I knew him, he consumed cocaine heavily and it appeared that he was dependant on it. He ran his drug business with an iron grip and did not allow anyone to cross or cheat him. Anyone who threatened him was either eliminated or dealt with in extreme ways. During the time I was there, I knew that he had ordered assassinations of people who had cheated or slighted him. In fact there were "sicarios" or paid assassins that were called in occasionally to do away with certain people. I remember Angarita calling in a *sicario* during the time I worked for him to kill a local trafficker.

10. In addition to my observations, I also experienced Angarita's violent

tendencies first hand. On one particular occasion, Jose almost shot me and three other men who worked for him. I remember once he came into the room we were sitting in and pointed a rifle at us and prepared to shoot us. It was obvious that he was very high on cocaine and he really did not know what he was doing. Luckily, I was able to knock the rifle out of his hand and disarm him. He was surprised at my quick reactions and later came to his senses. I firmly believe that if I had not been able to stop him at the time, he would have killed me and his three other employees.

11. Jose Angarita also threatened to kill me and my family. In July of 1984, I was arrested for attempting to sell 10 kilos of cocaine to an undercover DEA agent. Gail Kesselman, Angarita's former girlfriend, had apparently been questioned by the police for her suspected involvement in Angarita's drug business, and was told that if she helped them arrest Jose Angarita, she would be let go. Gail had done a great deal of work for Angarita, transporting and selling his drugs to New York, Texas and throughout California. She had been very close to him and knew most of his business dealings, but, at that time, she and Angarita were no longer romantically involved, so she contacted me and told me she had a large drug sale. I agreed to help her. As it turned out, the sale was a set up by the DEA. After my associates and I were arrested by DEA agents, I was told by the authorities that if I was willing to give them sufficient information to arrest Jose Angarita, they would offer me a deal. The DEA told me that they had been trying to obtain information to arrest Angarita for a long time because they knew that he had been

running large amounts of drugs into the San Jose area. However, I immediately began receiving threats from Angarita's associates and employees. They threatened to kill me and my wife. When she came to visit me in jail, she told me that two of Angarita's men were watching her house at all hours of the day. She also started receiving threats. I was terrified because I had seen such threats carried out and I knew that Angarita would have killed us if I provided any information to the officials about him.

12. Out of fear for my wife and me being killed, I refused to cooperate with the authorities and elected to serve my prison sentence rather than take the chance that they would not be able to protect us.

13. Angarita fled the country shortly after the Guerrero Brothers were killed. The last time I saw him was at a party I had at my house in the beginning of January 1984. He told me that he had to leave the country because he believed the police were after him for the Guerrero murders. In addition, he said he was facing charges at the time for molesting a minor. I also believe that there was a drug trafficker in Miami who had ordered his assassination. I believe Angarita returned to Bogota, Colombia and continued working in the drug cartel from there.

14. I was never contacted by any member of Miguel Bacigalupo's legal team. After I was sent to prison in 1985, and I knew Angarita had left the country for good, I would have provided the information in this statement to his defense attorney. Since I was in federal prison in another state, I did not know that Miguel was facing the death

penalty for the murder of the Guerreros. Given my experiences with Angarita, and the angry statements he made about wanting to kill the Guerrero brothers for ^{Stealing L.A.} cheating him out of two kilos of cocaine, I believe that Angarita went forward and ordered the killings of the Guerrero brothers. Also, due to my experiences, I believe that Angarita threatened Miguel and his family to insure Miguel's cooperation in killing the Guerrero brothers. Miguel would have been well-justified in taking Angarita's death threats extremely seriously and relying on the fact that if he did not comply, the threats would be carried out. Further, it was well known that Angarita was able to successfully elude the authorities and avoid arrest for his drug operation so it would not have been wise to rely on law enforcement to stop him. Just as I was not willing to rely on the authorities for protection from Angarita, Miguel was wise to believe that any protection promised by the authorities was not going to keep Angarita from carrying out his death threats. His network was extensive and very well organized. I am thankful that I never found myself in that position. Serving time in prison and being deported in order to avoid Angarita's wrath was horrible enough.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Dated: 26/2/99



LUIS ALBERTO ALBARRAN-ARNAL